

Brusco Tug and Barge Co. and International Organization of Masters, Mates and Pilots, Pacific Maritime Region, AFL-CIO. Case 19-CA-26716

April 11, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

Pursuant to a charge filed on October 21, 1999, the General Counsel of the National Labor Relations Board issued a complaint on January 31, 2000, alleging that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by promulgating and distributing to its employees classified as mates a rule that provides that any mate who participates in any union organizing campaign or who encourages any employee to join or participate in union activities will be terminated. The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On February 24, 2000, the General Counsel filed a Motion for Summary Judgment. On February 28, 2000, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

According to the undisputed allegations in the Motion for Summary Judgment, on October 21, 1999, the Union filed a petition for a representation election in Case 19-RC-13872, in which it sought to represent certain employees of the Respondent, including mates. On November 26, 1999, the Regional Director for Region 19 issued a Decision and Direction of Election which found, among other things, that mates employed by the Respondent are employees under the Act, and not statutory supervisors as had been argued by the Respondent. The Respondent filed a timely request for review which challenged solely the Regional Director's determination that mates were employees, and not supervisors.

On December 29, 1999, the Board issued an unpublished Order denying the Respondent's request for review, therefore affirming the Regional Director's finding that the Respondent's mates are employees under the Act. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).)

The instant complaint alleges that on about October 20, 1999, the Respondent promulgated and distributed to its mates, and since then has maintained, the following rule:

Any mate who participates in any union organizing campaign, or who encourages any employee to join or participate in union activities, will be terminated.

The complaint also alleges that the Respondent's mates are employees within the meaning of the Act. Accordingly, the complaint alleges that the Respondent's promulgation and maintenance of the above rule violates Section 8(a)(1) of the Act.

In its answer the Respondent admits the jurisdictional allegations of the complaint, and admits that on about October 20, 1999, it promulgated, distributed, and maintained the rule set forth above.¹ The Respondent's answer, however, denies the employee status of the mates, and consequently also denies the commission of any unfair labor practices. Thus, the only defense that the Respondent offers to the 8(a)(1) allegation here is a reiteration of its contention, raised and rejected in the representation proceeding, that the mates are not employees, but instead are statutory supervisors.

The issues raised by the Respondent's denials were fully considered by the Regional Director and the Board in Case 19-RC-13872. Further, in a letter attached to its answer, the Respondent's counsel stated that the only issue in this case is the status of the mates, and that the Respondent desired to stipulate the facts and rely solely on the record in the representation proceeding in the instant case so that the General Counsel "could file your motion for summary determination and the matter would move swiftly along its way for resolution." Subsequently, in a letter to the Respondent's counsel, the General Counsel verified a telephone conversation in which the Respondent's counsel stated that the Respondent does not desire to present any additional evidence regarding the status of the mates, but wishes to rely solely on the record in Case 19-RC-13872 because the Respondent desired to have the issue of whether the Board erred in finding mates to be employees "presented to the circuit court of appeals as quickly as possible."

Further, in its response to the Notice to Show Cause, the Respondent states that the sole question at issue raised by the instant complaint is whether mates are supervisors, and that "Respondent's position was fully explicated in its Request for Review and requires no further discussion." The Respondent's response asks that the Board "swiftly issue its decision" in this case, thereby "facilitating judicial review."

Thus, it is clear that there are no material issues of fact warranting a hearing in this case. All issues regarding the employee status of the mates raised by the Respondent's answer and response were or could have been litigated in the prior representation proceeding. The Re-

¹ The Respondent's answer also admits the labor organization status of the Union, and that the Respondent's owner, Roland "Bo" Brusco Jr., is a supervisor and agent of the Respondent within the meaning of the Act.

spondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. In addition, the Respondent has not raised any other issue regarding its promulgation and maintenance of the rule at issue that warrants a hearing.²

Unlike in an 8(a)(5) case where an employer is refusing to bargain in order to challenge a union's certification, when, as here, independent violations of Section 8(a)(1) or (3) are alleged, and the resolution of those issues turns on the employee status of certain individuals, the determination in a previous representation proceeding that those individuals are employees rather than statutory supervisors does not have binding force and may be relitigated. *Serv-U Stores*, 234 NLRB 1143, 1144 (1978); *Air Transit, Inc.*, 256 NLRB 278, 279 (1981); *Union Square Theatre Management*, 326 NLRB 70 (1998). The Board, however, may accord a certain "persuasive relevance, a kind of 'administrative comity'" to the prior representation case findings, subject to reconsideration and to any additional evidence adduced in the unfair labor practice case.³

Thus, although the Respondent was entitled to relitigate the issue of the mates' status in the instant case, the Respondent does not seek to litigate that issue nor does it offer any additional evidence to support its contention that the mates are supervisors. Instead, the Respondent merely asserts that the Board erred in the prior representation case. We have carefully considered our previous decision in the representation case, and we reaffirm our finding in that case that the Respondent's mates are employees within the meaning of the Act. The Respondent has raised nothing new in this proceeding, and there are no contested issues of fact warranting a hearing. Accordingly, we grant the Motion for Summary Judgment.⁴

On the entire record, the Board makes the following

² The Respondent's response asserts that the Respondent recently rescinded the alleged unlawful rule "as it applies to mates," but the Respondent concedes that this alleged rescission "goes merely to the remedy and not the substance of the Complaint." We find that the Respondent's assertion that it has rescinded the rule does not raise an issue requiring a hearing.

³ See *Serv-U Stores*, 234 NLRB at 1144, and *Air Transit, Inc.*, 256 NLRB at 279.

⁴ Member Hurtgen dissented from the denial of review in the representation case, Case 19-RC-13872, and he remains of that view. However, he notes that the Respondent has declined to pursue its right to relitigate the status of the mates in this proceeding, but merely relies solely on the record in the representation case. Thus, Member Hurtgen agrees that the Respondent has not raised any new matters that warrant a hearing in this unfair labor practice case. See *Air Transit, Inc.*, supra. In light of this, and for institutional reasons, he agrees with the decision to grant the General Counsel's Motion for Summary Judgment.

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a State of Washington corporation, with an office and place of business in Longview, Washington, has been engaged in the business of operating inland and offshore tugboats on the West Coast of the United States. During the 12-month period preceding issuance of the complaint, which period is representative of all material times, the Respondent in conducting its business operations described above, derived gross revenues in excess of \$50,000 for the transportation of freight from the State of Washington directly to points outside the State of Washington. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

As discussed above, on about October 20, 1999, the Respondent promulgated and distributed to its mates, and since then has maintained, the following rule:

Any mate who participates in any union organizing campaign, or who encourages any employee to join or participate in union activities, will be terminated.

The Respondent's promulgation, distribution, and maintenance of this rule clearly is unlawful. In view of the Board's finding in the representation case that the Respondent's mates are employees under the Act, this rule is invalid on its face, and constitutes the rawest form of interference, restraint, and coercion of employees in the exercise of Section 7 rights. Accordingly, we find that by these actions the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(1) of the Act, we shall order it to cease and desist, and to take certain affirmative action designed to effectuate the purposes of the Act. Specifically, we will require the Respondent to rescind the unlawful rule set forth above.

ORDER

The National Labor Relations Board orders that the Respondent, Brusco Tug and Barge Co., Longview, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating, distributing, and maintaining a rule that prohibits its mates from participating in any union organizing campaign, or from encouraging any employee

to join or participate in union activities, under threat of discharge.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the following rule that was distributed to mates and maintained since about October 20, 1999:

Any mate who participates in any union organizing campaign, or who encourages any employee to join or participate in union activities, will be terminated.

(b) Within 14 days after service by the Region, post at its facility in Longview, Washington, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 19 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the no-

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tice to all current employees and former employees employed by the Respondent at any time since October 20, 1999.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT promulgate, distribute, and maintain a rule that prohibits our mates from participating in any union organizing campaign, or from encouraging any employee to join or participate in union activities, under threat of discharge.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the following rule that was distributed to mates and maintained since about October 20, 1999:

Any mate who participates in any union organizing campaign, or who encourages any employee to join or participate in union activities, will be terminated.

BRUSCO TUG AND BARGE CO.